87-1370

Supreme Court, U.S.
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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

N.W. ENTERPRISES, INC.,
*Petitioner*

v.

THE STATE OF TEXAS,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS 14TH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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January, 1988

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

## QUESTIONS PRESENTED

1. Did Texas appellate courts misinterpret the Supreme Court in *Mishkin v. New York,* 383 U.S. 502 (1966), thus changing the standard upon which the prurient appeal requirements of the *Miller* test must be judged?

2. Does a Texas statute that permits a corporation to be criminally responsible for a crime requiring specific intent, violate the due process clause of the Fourteenth Amendment?

3. Did the search warrant relied upon by the State to authorize the seizure of a film used to prosecute the Petitioner, fail to focus searchingly on the issue of obscenity, as required under the First, Fourth, and Fourteenth Amendments?

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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

N.W. ENTERPRISES, INC.,
*Petitioner*

v.

THE STATE OF TEXAS,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS 14TH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Fourteenth Court of Appeals of The State of Texas and the Order of the Court of Criminal Appeals of the State of Texas, entered January 28, 1987 (Motion for Rehearing denied November 2, 1987) refusing to accept a Petition for Discretionary Review of said opinion.

## CITATION TO OPINIONS BELOW

The Court of Criminal Appeals refused Petitioner's Petition For Discretionary Review by unpublished Order dated January 28, 1987 under Case Number 0206-86. The official notice is attached as Appendix "A". The Court of Criminal Appeals denied Petitioner's Motion for Rehearing November 12, 1987. The official notice of the denial is attached as Appendix "B". The opinion and judgment of the Fourteenth Court of Appeals, which is unpublished, was filed January 9, 1986, under Case Number C14-84-533-CR and is attached as Appendix "C".

## JURISDICTION

Jurisdiction of this Court is invoked under State Courts; Appeal; Certiorari, 28 U.S.C. § 1257(3) (1948), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involved the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involved Tex. Penal Code Ann. §§ 1.07(27), 6.04, 7.21, 7.22 (1974), 43.21, 43.23 (1979) and from the Code of Criminal Procedure, Tex. Code Crim. Proc. Ann. arts. 15.05, 18.01, 1803 (1965).

## STATEMENT OF THE CASE

Petitioner, a corporation, is accused of exhibiting allegedly obscene material, a film entitled "Shivaree", to a City of Houston Police Officer on February 10, 1982. The Petitioner presented a number of pre-trial motions

which were considered by the Court and went to trial before a jury. After presenting evidence on its own behalf the jury returned a verdict of guilty and the Court assessed punishment at a fine of $10,000.00.

## ARGUMENT

### MISINTERPRETATION OF *MISHKIN V. NEW YORK*

Under Texas law, sexually explicit material is not obscene unless it is judged in accordance with the three pronged *Miller* test as expressed in Tex. Penal Code Ann. § 43.21 (1979); *Miller v. California*, 413 U.S. 15 (1973).

Section 43.21 provides:

"§ 43.21 Definitions

(a) In this chapter:

(1) 'Obscene' means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the pruient interest in sex;

(B) depicts and describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or

> arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
>
> (C) taken as a whole, lacks serious literary, artistic, political and scientific value."

The Trial Court charged the jury under *Mishkin v. New York*, 383 U.S. 502 (1966) that:

> " 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designated for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience."

The State's only evidence on the issue of current community standards and on the issue of obscenity was the film, "Shivaree", the subject of the prosecution.

The Petitioner, on the other hand, introduced testimony from three witnesses from the "gay" or homosexual community of Harris County, Texas, all of whom stated that the film did not appeal to the prurient interest in sex of either themselves or other members of the gay community. Based upon the defense testimony, which was uncontroverted by the State, the State failed to prove by competent evidence the first prong of the *Miller* test, i.e., community standards as it applies to prurient appeal.

The evidence presented by the State wholly failed to prove the more narrow, required definition of com-

munity where the film was produced for and distributed to a specially susceptible audience, namely the homosexual community of Harris County, Texas.

The Court of Appeals chose to interpret *Mishkin* stating that it, ". . . merely provides that if the allegedly obscene material repulses rather than appeals to the average member of society, the material may nonetheless be found obscene if it appeals to the prurient interest in sex of a susceptible subgroup." The Court reasoned that under *Mishkin*, the jury would consider whether the film, ". . . appealed to the prurient interest in sex of the average homosexual in the community or if it appealed to the prurient interest in sex of the average person in the community." The Court found that if the material appealed to the prurient interest in sex of either the average person in the community or the homosexual community, the jury could convict.

The first and second prong of the *Miller* obscenity standard, appeal to prurient interest and patent offensiveness are fact issues for consideration by the jury applying contemporary community standards. *Smith v. United States*, 431 U.S. 291 (1977); *Pope v. Illinois*, 55 U.S. L.W. 4595 (U.S. May 4, 1987).

The Court in *Mishkin*, adjusted the prurient appeal requirement. This Court altered this prong of the *Miller* test, ". . . by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group."

The evidence in this case clearly demonstrated that the gay or homosexual community was the intended target for which the film was conceived and marketed.

The adjustment proscribed in *Mishkin* is a limitation, not an expansion of the prurient appeal requirement. The Court of Appeals, by misconstruing the application of *Mishkin*, has created a new definition for the prurient appeal requirement thus depriving the Petitioner of the common and accepted understanding of the case. The Petitioner is harmed by the Court of Appeals misunderstanding and misapplication of *Mishkin* for the reason that if the Court of Appeals had made the same prurient appeal adjustment noted in *Mishkin*, and limited the prurient appeal requirement to the probable recipient group, the homosexual community, it would have found that the jury could not have found the film obscene based upon the evidence before the jury.

## CORPORATE CULPABILITY

The State has charged the corporate Petitioner with intentionally exhibiting an obscene film. During the trial of the case, the State offered evidence that the Petitioner was a corporation. Petitioner objected that the Texas legislature did not intend that a corporation be criminally responsible for a crime requiring a finding of specific intent and filed its Motion to Dismiss the Information. The Motion to Dismiss was denied by the Trial Court.

The Petitioner is charged by Information pursuant to Tex. Penal Code Ann. § 43.23 (1979). Section 43.23 refers to a "person" committing the offense [§ 43.23(a) and (c)] or a "person" in possession [§ 43.23(f) and (g)] and a "person" promoting obscenity [§ 43.23(e)].

Tex. Penal Code Ann. § 1.07(27) (1974), includes a corporation within the definition of a "person", and makes a corporation criminally responsible for the conduct of its agents acting within the course and scope of employ-

ment. Commercial obscenity is a personal offense, not governed by strict liability and requiring a finding of personal culpability, i.e., *intentional* exhibition and *knowing* the content and character of the material. Tex. Penal Code Ann. §§ 6.04 (1974) and 43.23 (1979); *Davis v. State,* 658 S.W.2d 572 (Tex. Crim. App. 1983).

It is fundamental to our criminal jurisprudence that guilt is personal and not vicarious and thus requires proof beyond a reasonable doubt, and proof of a culpable mental state. *Annot.,* 83 A.L.R.2d 1117 (1962).

The Court of Appeals found that since the trial court charged the jury, that if the Petitioner's agent, the sales clerk, had knowledge and intent, the conduct of that agent, performed within the course and scope of his employment and on behalf of the corporation, is knowledge and intent that can be attributed to the corporation.

This holding violates the corporation's right to due process of law and equal protection for the reason that such a standard is arbitrary, and capricious.

The Court of Appeals believes that the corporate defendant can be liable as an accomplice. Of course, without a specific showing of some act of the corporate defendant affirming the deed of the agent, the corporate defendant could be the unwilling, ignorant victim, unable to prevent or rectify the criminal act of the agent.

This corporate vulnerability is further enhanced by the fact, that as "people" go, corporations are usually ponderous at best, and perhaps unable to ward off the acts of the agents before they occur.[1]

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1. The Court of Criminal Appeals has recently held that a corporation is a "person" for purposes of criminal prosecution. *Vaughn and Sons, Inc. v. State,* 737 S.W.2d 805 (Tex. Crim. App. 1987).

Petitioner, already hindered and burdened by criminal responsibility for the acts of its agents, requested from the trial court, a charge on "parties".

A "person", culpable for committing commercial obscenity must also be capable of intent and knowledge. It is obvious that a corporation is incapable of possessing a condition of the mind such as intent or knowledge unless specifically formulated by a board of directors.

The Texas Court of Criminal Appeals has held that if the evidence introduced at trial raises the issue that the conduct of a Defendant (Petitioner) then on trial, is *not* sufficient, in and of itself, to sustain a conviction, the State's case rests on the law of parties and is dependent, at least in part, upon the conduct of another. In such a circumstance the law of parties must be submitted and made applicable to the facts of the case. *McCuin v. State,* 505 S.W.2d 831 (Tex. Crim. App. 1974).

When considering whether one has participated as a party, the Court may look at events, before, during and after the commission of a crime. *Tarpley v. State,* 565 S.W.2d 525 (Tex. Crim. App. 1978).

The Petitioner is charged with the exhibition of an obscene film. The state proved that Dennis Funck, a clerk, was responsible for exhibiting the film.

The State did not introduce evidence that the Petitioner had anything to do with the act of showing the film. The Court of Appeals opines that the corporate defendant is criminally responsible for the criminal act of its agent. In support of such a theory, the next logical step is for the State to prove a causal (intentional and knowing) nexus between the activity of the agent and the conscious

objectives of the corporate defendant to engage in the illegal conduct. The Petitioner's criminal conduct, if any, is dependent upon the conduct of Funck, thus the law of parties should have been submitted to the jury. *McCuin, supra; Huff v. State,* 630 S.W.2d 909 (Tex. App.—Amarillo 1982); *Gilmore v. State,* 666 S.W.2d 136 (Tex. App.—Amarillo 1984); *Coleman v. State,* 632 S.W.2d 859 (Tex. App.—Hou. [14th Dist.] 1982). By denying the "party" charge to the Petitioner, the Court of Appeals has further isolated the corporate defendant in the quagmire of strict liability.

The Court of Appeals, by allowing the Petitioner to be responsible for the criminal act of its agent, further eroded the Petitioner's due process rights by failing to require that the jury apply "intentionally and knowing" to any act of the corporate Petitioner.

The Information filed by the State against the Petitioner charges that N.W. Enterprises, Inc., "knowing the content and character of the material", exhibited obscene material. The charge to the jury, on the other hand, in applying the law to the facts, charges that the jury must find that a third party, Funck the agent, had knowledge of the content and character of the obscene material.

The Petitioner objected to the charge because it did not apply the law to the facts properly and requested a charge applying the culpable mental state of "knowing" to the Petitioner, the corporation.

The First Amendment of the United States Constitution protects the exhibition of films and therefore the State must prove that the accused exhibitor of obscene material must have knowledge of the content and character of the material before a film's exhibition may be punished. *Davis v. State, supra.*

Where the Court omits from the section of the charge applying the facts to the law a required element of an offense, the omission will render the conviction fatally defective. *Doyle v. State,* 631 S.W.2d 732 (Tex. Crim. App. 1982).

Petitioner is alleged to have committed the offense yet the Court allowed the jury to find that if a third party, not charged in the information, committed one of the culpable acts the corporate defendant would be liable. It should follow that if it is fundamental error for a court to omit from the application paragraph of the charge, the culpable mental state (*Doyle, supra*), then it is fundamental error for the Court to allow the jury to convict the Petitioner upon a jury finding of culpability of a third party not charged. Please note that the Court did not charge on the law of the parties or conspiracy.

## SEARCH WARRANT

Petitioner filed an Amended Motion to Suppress and after a hearing on the motion, the Motion to Suppress was denied.

The Petitioner's complaint about the search warrant involves three basic constitutional principles, to-wit:

A. *FIRST AMENDMENT* — The exhibition of sexually explicit material (films, books and magazines) carries with it a presumption of First Amendment protection. *Roaden v. Kentucky,* 413 U.S. 496 (1973). See also, *Universal Amusement v. Vance,* 587 F.2d 159 (5th Cir. 1978), affirmed 445 U.S. 305 (1980), rehearing denied, 446 U.S. 947 (1980) and *Marcus v. Search Warrant,* 367 U.S. 717 (1961).

B. *FOURTH AMENDMENT* — A search and seizure must be based upon probable cause. *Michigan v. DeFillippo,* 443 U.S. 31 (1979).

The affidavit of Officer Jett, in support of the search warrant utilized by the State to seize the film "Shivaree" and ultimately prosecute the Petitioner, is fundamentally defective.

The Motion to Suppress should have been granted for the reason that the Petitioner was brought into the criminal system after a seizure based upon a fundamentally unfair search warrant based upon a defective affidavit in violation of Petitioner's First and Fourteenth Amendment rights under the United States Constitution. The affidavit submitted by Officer Jett did not *focus searchingly* on the issue of obscenity and therefore the search warrant must fail.

C. *FOURTEENTH AMENDMENT* — A prosecution is void unless it complies with due process of law.

Any citizen, has the right to purchase for his own possession, protected (sexually explicit) or obscene material. *Stanley v. Georgia,* 394 U.S. 557 (1969).

Police who wish to prosecute, under the Texas obscenity laws must utilize proper police procedures as stated in the Texas Code of Criminal Procedure and as reviewed in Texas case law. Additionally, in the First Amendment area, police procedures relating to obscenity are regulated by the special requirements of federal First Amendment law.

Before a person's right, under the First Amendment, to exhibit protected material, will be infringed upon or regulated, the police must *focus searchingly* on the ques-

tion of obscenity. *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968). Before a film can be seized and a person prosecuted for the exhibition of obscene material, both the federal requirement for a finding of probable cause and the Texas requirement for a demonstration of probable cause must be satisfied. *Lee Art, supra.*

The officer, in this case, sought a judicial determination of probable cause by submitting an affidavit that did not focus searchingly on the issue of obscenity.

The Petitioner was harmed by the illegal search and seizure because the Petitioner had a reasonable expectation of privacy in exercising its First Amendment rights to exhibit films.

Additionally the Petitioner has "automatic standing" to complain of the illegal search because the film seizure brought the Petitioner into the criminal system and the seized film is itself an essential element of the offense.

The affidavit supporting the search warrant must show that the accused has committed some offense against the laws of the State. Tex. Code Crim. Proc. Ann., arts. 15.05, 18.01 and 18.03 (1965). Additionally, the bare allegation of obscenity will not suffice. The affidavit must focus searchingly on the question of obscenity. *Lee Art Theatre, supra.*

A mere statement of the officer's belief and cause to suspect is insufficient to support the issuance of a search warrant. *United States v. Upshaw,* 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972). In *Upshaw,* the search warrant was issued on the basis of an affidavit by an FBI agent. Such affidavit included the following introductory and qualifying phrase:

> ". . . That he has reason to believe that on the premises known as the Economy Press, Inc., 3204-A 12th Avenue North, Birmingham, Alabama, there is now being concealed certain property . . ."

An affidavit is insufficient when it consists of nothing more than mere statement of an affiant's belief. Mere affirmance of belief or suspicion is inadequate. *Upshaw, supra. Nathanson v. United States,* 290 U.S. 41 (1933).

The affidavit explains the subject matter of the allegedly obscene film. It, however, does not provide facts demonstrating how either Funck, the clerk, or Petitioner had knowledge of the content and character of the film as required under *Davis v. State, supra.*

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Court of Appeals and the Court of Criminal Appeals (by refusing to consider Petitioner's Petition for Discretionary Review) specifically provided an interpretation of the United States Supreme Court case, *Mishkin v. New York, supra* in its opinion (See Appendix "C"). The Court wrote its opinion based upon the request of Petitioner, in its brief the court, to find the evidence insufficient to support the jury's conclusion that the film was obscene under the *Miller,* three prong test.

Petitioner relied upon a holding from the Court of Appeals (*Vaughn and Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. App.—Texarkana 1983)) in support of the Petitioner's position that a corporate defendant cannot commit a crime requiring specific intent without some action on the part of the corporate board of directors.

The Court of Criminal Appeals overruled the Court of Appeals (*Vaughn and Sons, Inc. v. State*, 737 S.W.2d 805 (Tex. Crim. App. 1987)) during the period of time it was also considering Petitioner's Petition for Discretionary Review of this case. Therefore, it wasn't until the Court of Criminal Appeals wrote the opinion in *Vaughn, supra* and refused to review this case, that due process and equal protection violation became known to the Petitioner. The Court of Criminal Appeals has infringed upon Petitioner's rights to due process of law and equal protection by its holding in *Vaughn and Sons, Inc., supra.*

Petitioner attacked the search warrant used to seize the film "Shivaree", under the First, Fourth, and Fourteenth Amendments in the trial court by Motions and in the Court of Appeals and Court of Criminal Appeals in its briefs. The various courts found against the Petitioner.

## REASONS FOR GRANTING THE WRIT

This petition for certiorari should be granted for the reason that the Petitioner has been denied due process of law, equal protection of the law, its rights to freedom of expression and its right to be free from unlawful and unreasonable searches and seizures.

In the first instance the Court of Appeals has misinterpreted this Court's ruling in *Mishkin v. New York, supra*, to the degree that the mistinterpretation probably affected the outcome of the case. If the Texas appellate courts had properly interpreted *Mishkin*, the jury could not have found the film obscene. This court should grant this Application for Writ of Certiorari to correct the

Texas appellate courts and to provide direction for the use of the prurient appeal standard under *Miller* and *Mishkin*.

This Court should also find that a corporation, charged with the intentional and knowing exhibition of a film, cannot commit the offense of the exhibition of obscene material without a specific showing of scienter. To hold otherwise is to deny to the corporate defendant the same rights an individual has under the Fourteenth Amendment to the United States Constitution.

Additionally this writ should be granted to require the State of Texas to adjust its probable cause requirement, where the First Amendment is concerned, to the strict probable cause standard under *Lee Art Theatre v. Virginia, supra,* i.e., to *focus searchingly* on the question of obscenity.

## CONCLUSION

Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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713/520-1719

*Attorney for Petitioner,*
*N.W. Enterprises, Inc.*

January, 1988
Houston, Texas

## APPENDIX A

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0206-86

STYLE: N. W. Enterprises, Inc.

November 12, 1987

On this day the Appellant's Motion for Rehearing was denied.

COA#: 14-84-00533-CR Thomas Lowe, Clerk

---

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

Charles Rice Young
3401 Louisiana, Suite 220
Houston, TX 77002

## APPENDIX B

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0206-86

STYLE: N. W. Enterprises, Inc.

January 28, 1987

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

COA#: 14-84-00533-CR Thomas Lowe, Clerk

---

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

Charles Rice Young
3401 Louisiana, Suite 220
Houston, TX 77002

## APPENDIX C

Affirmed and Opinion filed January 9, 1986.

NO. C14-84-533-CR

N.W. ENTERPRISES, INC., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the County Criminal Court at law No. 9
of Harris County

Cause No. 644,480

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### OPINION

A jury found the appellant, N.W. Enterprises, a corporation, guilty of exhibiting obscene material. A fine of $10,000 was imposed by the court. On appeal, the appellant argues nine grounds of error. These grounds of error center upon (1) the affidavit upon which a search warrant for the film "Shivaree" was issued; (2) the appellant's assertion that a corporation cannot be held criminally responsible under the obscenity laws; and (3) the sufficiency of the evidence to support the conviction. We find no error and affirm.

On February 9, 1982, Officer S.R. Jett entered the Stadium Book Store, received change from Dennis Funck, the bookstore's clerk, and was admitted by the clerk into the bookstore's film viewing area. The film viewing area was otherwise locked and inexcessible to Officer Jett.

Once inside the arcade, Officer Jett entered booth number 12 and viewed the film "Shivaree". Believing the film to be obscene, Officer Jett drafted a synopsis of the film in an affidavit which he presented to a magistrate. The magistrate issued a search warrant. Officer Jett then executed the search warrant.

In appellant's first two grounds of error he argues that the affidavit to support the issuance of the search warrant does not indicate probable cause and further that the search warrant is defective because it does not "focus searchingly on the issue of obscenity." We find however, that the appellant has not preserved any error regarding the affidavit because the affidavit does not appear in the record. The appellant did not introduce a copy of the affidavit into evidence, and, although the state attached a copy of the affidavit to the search warrant which was offered into evidence as State's Exhibit Number One, the record before us does not contain State's Exhibit Number One.

After the appellant's appeal was filed but prior to submission, this court granted the appellant's motion to supplement the record. However, the appellant's supplemental transcript does not contain a copy of State's Exhibit Number One. A copy of the officer's affidavit does appear in the supplemental transcript, but we are unable to determine whether this affidavit is the same as the one admitted into evidence by the state. It is incumbent upon the appellant to provide this court with a complete record. TEX. CODE CRIM. PROC. art. 40.09(5) (Vernon Supp. 1985); *Daughtrey v. State*, 544 S.W.2d 158, 159 (Tex. Crim. App. 1976). The appellant's failing to object to the supplemental transcript waives any complaint that he

might have to the absence of State's Exhibit Number One from the transcript. *Lynch v. State,* 502 S.W.2d 740, 741-42 (Tex. Crim. App. 1973); *Lopez v. State,* 681 S.W.2d 788, 791 (Tex. App.—Houston [14th Dist.] 1984, no pet.).

Even if we were to assume that the affidavit that we have read is the same as that appended to the State's Exhibit Number One, we would find the appellant's arguments against the affidavit meritless. The appellant argues that the affidavit fails to "focus searchingly on the issue of obscenity" for two reasons: (1) the affidavit fails to focus on any *sale* of obscene material and (2) the affidavit fails to show any facts upon which a neutral magistrate could find probable cause that the appellant's clerk knew the character or content of the film "Shivaree".

A search warrant may be issued to search for and seize obscene materials kept or prepared for commercial distribution or exhibition, subject to additional rules set forth by law. Tex. Code Crim. Proc. art. 18.02(6) (Vernon Supp. 1985). Unlike subsection (10), subsection (6) of article 18.02 does not require that the affidavit supporting a search warrant allege facts constituting probable cause of an offense. The affidavit needs allege only facts showing probable cause that the materials sought are (1) obscene and (2) are kept or prepared for commercial distribution or exhibition. Officer Jett's affidavit supplies facts sufficent to show both of these elements. The affidavit contains four full paragraphs describing the film "Shivaree" in graphic detail. Officer Jett himself concluded that the film was obscene. The affidavit also shows that Officer Jett paid a fee to enter the film arcade and that he was allowed to view the film after

inserting quarters into the viewing booth's projector. We conclude that these facts show probable cause to believe the appellant held obscene materials for commercial exhibition at the Stadium Bookstore. The appellant's first and second grounds of error are overruled.

The thrust of grounds of error numbers three through five is that a corporation can not be prosecuted under the obscenity laws. Appellant contends that obscenity prosecutions require the showing of specific intent and that a corporation is not capable of specific intent. Therefore, reasons the appellant, the trial court erred in denying its motion to quash the indictment and its charge on parties. A charge on the law of parties is necessary only when the conduct of the accused is not sufficient, of itself, to support a conviction. *McCuin v. State,* 505 S.W.2d 827, 830 (Tex. Crim. App. 1974). A charge on the law of parties was not necessary and the indictment was authorized because a corporation may be prosecuted under the obscenity laws.

A *person* commits an offense if, knowing its contents and character, he promotes or possesses with intent to promote any obscene material. Tex. Penal Code Ann. § 43.23(c)(1) (Vernon Supp. 1985). A corporation is a "person." Tex. Penal Code Ann. § 1.07(27) (Vernon 1974). Thus, corporations fall within the purview of § 43.23(c)(1). The appellant cites *Vaughan & Sons, Inc. v. State,* 649 S.W.2d 677 (Tex. App.—Texarkana 1983, pet. pending), for the proposition that corporations cannot be held responsible for specific intent crimes. We disagree with appellant's reading of *Vaughan* and believe that *Vaughan* merely holds that it is not clear that the legislature intended that corporations be held responsi-

ble for certain crimes, among which is the crime of criminally negligent homicide. We believe that the legislature made clear its intent to subject corporations to § 43.23 by making that section applicable to "persons" rather than "individuals." Therefore, because we believe corporations can be held liable under section 43.23(c)(1), we find that the appellant was properly indicted under the obscenity laws and that the trial court properly declined to charge the jury on the law of parties. Appellant's grounds three through five are overruled.

Appellant's grounds numbers six and seven complain that the court's charge improperly failed to inquire whether the *appellant*, knowing the character and content of the film, intentionally promoted the film. The charge instead inquired into the knowledge and intent of the appellant's agent, Dennis M. Funck. We find no error because under section 7.22(a)(1), Tex. Penal Code Ann. (Vernon 1974), the conduct of an agent performed within the scope of his employment and on behalf of a corporation is attributed as a matter of law to the corporation. Therefore, to determine a corporation's guilt requires only that the jury be charged concerning the conduct of the corporation's agent. Appellant's grounds of error number six and seven are overruled.

The appellant's grounds of error numbers eight and nine challenge the sufficiency of the evidence. We believe that appellant asserts that there is insufficient evidence (1) that the corporation was in existence on the date of the offense, (2) that Funck was the agent of the corporation, (3) that he was acting on behalf of the corporation, or (4) that the corporation authorized Mr. Funck's actions. In addition, appellant argues that the

state failed to disprove that the film did not appeal to the prurient interest in sex of Houston's homosexual community.

The state presented a certified copy of the appellant's articles of incorporation filed July 6, 1981. The articles of incorporation reflect that the corporation is of perpetual duration. There is no evidence in the record suggesting that the corporation was not in existence on the date of the offense. We conclude that the evidence supports the jury's implied finding that the appellant was in existence on the date of the offense.

Evidence in the record justifies the jury's finding that Funck acted as the appellant's agent, in the scope of that agency, and under the appellant's authority. Funck was hired toward the end of summer, 1981 to sell merchandise and collect a fee for allowing customers into the Stadium Bookstore's peep show arcade. He later became a supervisor for the appellant. His duties included making bank deposits, selecting films, preparing films for loading into projectors, inspecting the projectors, delivering other employee's paychecks, and closing the cash register. Funck also had access to a key to the Stadium Bookstore. On the date of the offense Mr. Funck took officer Jett's entrance fee and "buzzed" Officer Jett into the arcade. Twice Dennis Funck was convicted for promoting obscene material and each time the appellant paid his fine. We find this evidence sufficient to support the jury verdict.

Finally, the appellant argues that the evidence is insufficient to show that the film "Shiveree" is obscene. Three elements must be proven to find material obscene. Tex. Penal Code Ann. § 43.21 (Vernon Supp. 1981).

Under the first element, and the only one challenged here, the average person, applying contemporary community standards, must find that the material, taken as a whole, appeals to the prurient interest in sex. The appellant notes that the state did not offer evidence defining current community standards and that the only evidence on community standards is evidence introduced by the appellant. The appellant provided testimony by three witnesses from the "gay" or homosexual community of Harris County, Texas, who testified that the film did not appeal to the prurient interest in sex of either themselves or other members of the gay community. The appellant, citing *Mishkin v. New York,* 383 U.S. 502 (1966), argues that because the only evidence of community standards is the testimony of its three witnesses, the standard against which the film should be measured is that of the homosexual community.

We disagree. *Mishkin* does not, when evidence of the sexual preference of a susceptible subgroup in a particular community is introduced, exclude from the jury's determination the view of the average person in that community. Rather, *Mishkin* merely provides that if the allegedly obscene material repulses rather than appeals to the average member of society, the material may nonetheless be found obscene if it appeals to the prurient interest in sex of a susceptible subgroup. Therefore, the jury was entitled to consider whether the film "Shiveree" appealed to the prurient interest in sex of the average homosexual in the community or if it appealed to the prurient interest in sex of the average person in the community. *Larue v. State,* 637 S.W.2d 934, 935 (Tex. Crim. App. 1982).

The jury found the film "Shivaree" obscene. This finding could indicate that the jury found the film to appeal to the prurient interest in sex of the average member of the community. Or it could indicate that, in spite of the appellant's evidence to the contrary, the film appealed to the prurient interest in sex of the average homosexual; under *Larue, supra,* the jury could reject the testimony of the appellant's witnesses and determine from their own experience of what appeals to homosexuals that the film "Shivaree" appeals to that interest. It is irrelevant whether the jury found the film obscene under one standard rather than the other. Appellant's eighth and ninth grounds of error are overruled.

Conviction affirmed.

/s/ Bill Cannon
Associate Justice

Judgment rendered and Opinion filed January 9, 1986.

Panel consists of Associate Justices Junell, Robertson and Cannon.

No Publication — Tex. Cr. App. R. 207.

Supreme Court, U.S.
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No. 87-1370

# IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1987

N. W. ENTERPRISES, INC.,
*Petitioner,*

v.

THE STATE OF TEXAS,
*Respondent.*

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District At Houston, Texas

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that the trial court correctly charged the jury on the prurient appeal requirement necessary to support an obscenity conviction and that the evidence was sufficient to support a conviction thereunder?

II. Was the trial court's charge constitutionally infirm because it did not instruct the jury to determine whether the corporate defendant itself possessed the requisite specific intent necessary for an offense of promoting obscenity?

III. Was there probable cause to support the issuance of the search warrant pursuant to which obscene material was seized and admitted into evidence at trial?

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No. 87-1370

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

N. W. ENTERPRISES, INC.,
*Petitioner,*

v.

THE STATE OF TEXAS,
*Respondent.*

**On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District At Houston, Texas**

# RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

## OPINION BELOW

The opinion of the Fourteenth Court of Appeals of Texas filed January 9, 1986, is unpublished, but is

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "N. W. Enterprises."

reproduced as Appendix C to the Petition for Writ of Certiorari. *N. W. Enterprises v. State*, No. C14-84-533-CR. The Texas Court of Criminal Appeals refused N. W. Enterprises' Petition for Discretionary Review on January 28, 1987, and denied its Motion for Rehearing on November 12, 1987.

## JURISDICTION

N. W. Enterprises seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

N. W. Enterprises' claims are based on the first, fourth and fourteenth amendments to the United States Constitution. Also involved herein are Sections 1.07, 6.03, 7.22, 43.21, and 43.23 of the Texas Penal Code.

## STATEMENT OF THE CASE

On March 11, 1982, N. W. Enterprises was charged by information with promoting obscene material by exhibiting a film entitled "Shivaree." N. W. Enterprises pled not guilty but was nevertheless convicted of the misdemeanor offense of promoting obscene material. The court assessed punishment of a fine of ten thousand dollars.

On direct appeal, N. W. Enterprises argued substantially the same points of error which it now advances in its petition for writ of certiorari. The Fourteenth Court of Appeals of Texas rejected N. W. Enterprises' claims and affirmed the judgment of the trial court. *N. W. Enterprises v. State*, No. C14-84-533-CR (Tex.App.--Houston [14th Dist.] January 9,

1986, pet. ref'd). The Texas Court of Criminal Appeals refused N. W. Enterprises' Petition for Discretionary Review and Motion for Rehearing.

## STATEMENT OF FACTS

The facts of the offense are adequately set forth in the opinion of the Texas Court of Appeals. *See* Appendix C to the petition at 1-2, 6.

## SUMMARY OF ARGUMENT

N. W. Enterprises' claimed constitutional errors are without merit. The trial court instructed the jury that it could find that the obscene film exhibited by N. W. Enterprises appealed to the prurient interest in sex of either the homosexual community or the average member of the community. This Court has never imposed an absolute requirement that where obscene material is directed at a specific group, the prurient interest requirement necessary for a finding of obscenity must be adjudged only with reference to that specific group. On the contrary, this Court has approved instructions on prurient appeal to deviant sexual groups as a part of an instruction pertaining to appeal to an average person when the evidence, such as here, would warrant such an instruction. While this Court has specifically reserved judgment on whether in cases involving "bizarre" sexual deviant groups the prurient appeal requirement should be adjudged solely from the vantage point of the particular group, this case is not a proper one for the Court's consideration of that question. The material in this case deals solely with homosexual intercourse and sodomy. This Court's previous opinions aptly demonstrate that homosexuals are not such a deviant sexual group that the average jury would be unable to determine what appeals to homosexuals' prurient interest in sex by considering their own experiences of what appeals to homosexuals.

The jury charge of which N. W. Enterprises complains actually accorded with the requirements of due process because it did not relieve the state of its burden of proving all the elements of the offense charged beyond a reasonable doubt. Therefore, the mere fact that N. W. Enterprises did not receive the charge it requested is not worthy of this Court's attention because criminal procedure in state courts is best left to the states unless it offends a fundamental principle of justice.

Finally, the seizure of materials presumptively protected by the first amendment is to be evaluated under the same standard of probable cause used to review warrant applications in general. Under this standard, there is little doubt but that the search warrant used to seize the obscene material from N. W. Enterprises' premises was supported by probable cause to believe that the material was obscene under Texas law. Therefore, the material was properly admitted into evidence at trial.

## REASONS FOR DENYING THE WRIT

### I.

### THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. N. W. Enterprises has advanced no special or important reason in this case, and none exists. Moreover, this case presents only the question whether well settled constitutional principles were

correctly applied in this case. Thus, no important question of law is presented.

## II.

## THE STATE ESTABLISHED THE PRURIENT APPEAL REQUIREMENT NECESSARY TO SUPPORT A FINDING OF OBSCENITY.

### A. The trial court correctly defined the standard for determining whether material appeals to a prurient interest in sex.

It is well settled that obscene material is not protected by the first or fourteenth amendments as a limitation on the state police power. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court established a tripartite test for judging the constitutionality of convictions under state statutes designed to regulate obscene materials. In order to sustain a conviction under such a statute, the jury must find that: (a) the average person, applying contemporary community standards would find that the allegedly obscene material, taken as a whole, appeals to a prurient interest in sex, (b) the allegedly obscene material depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) the allegedly obscene material, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24. Pursuant to this constitutional mandate, the Texas Legislature enacted Tex. Penal Code Ann. §§ 43.21, 43.23 (Vernon Supp. 1988), under which N. W. Enterprises was convicted of promoting obscenity.

The focus here is upon the first branch of the three-part test. N. W. Enterprises does not dispute that "Shivaree" depicted sexual conduct defined by Section 43.21 or that the film lacked serious literary, artistic, political or scientific value. Rather, N. W. Enterprises contends that under *Mishkin v. New York*, 383 U.S. 502 (1966), the state's evidence was insufficient to prove that "Shivaree" appealed to a prurient interest in sex. N. W. Enterprises' position is based on an erroneous interpretation of *Mishkin*.

In *Mishkin*, the state prosecuted the defendant for promoting obscenity because he had published some books depicting various deviant sexual practices including flagellation, fetishism, and lesbianism. The defendant contended that these books could not satisfy the prurient appeal requirement because they did not appeal to a prurient interest of the "average person" in sex; instead of stimulating the erotic, they disgusted and sickened the viewer. *Id.* at 508. The Court rejected this argument as based on an unrealistic interpretation of the prurient appeal requirement:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement of the *Roth [v. United States*, 354 U.S. 476 (1948)] test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average" or "normal" person in Roth . . . does not foreclose this holding. . . . We adjust the prurient-appeal requirement to the social realities by *permitting* the appeal of this type of material to be assessed in terms of the

> sexual interest of its intended and probable recipient group. . . .[2]

*Id.* at 508-09 (footnotes omitted, emphasis added). Thus, quite apart from limiting the prurient appeal requirement as N. W. Enterprises suggests, *Mishkin* in fact expanded the prurient appeal requirement. Further, *Mishkin* did not impose an iron-clad rule that where particular material was created for a clearly defined group, the trial court could only instruct the jury to consider whether the material appealed to that defined group's prurient interest in sex. On the contrary, *Mishkin* merely permits the trial court to so instruct the jury. Further, *Mishkin* did not delineate any guidelines for determining what constitutes a deviant sexual group for purposes of this broader instruction.

The state concedes that "Shivaree" was primarily produced for and directed at a homosexual audience; however, this fact did not foreclose the use of the trial court's conditional definition of the prurient appeal requirement in its jury charge.[3] This Court has never

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[2]*Mishkin* was decided under the *Roth* standard of obscenity. In *Miller*, this Court altered the *Roth* standard by rejecting a national standards test in favor of the community standard of obscenity and adopting an actual local community test. *Miller*, however, seemingly left the *Mishkin* reference to the prurient-appeal requirement intact.

[3]The trial court instructed the jury that:

> "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designated for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

held that when allegedly obscene material is primarily directed at a specific group, the prurient appeal requirement must be adjudged only with reference to that group. The crux of *Mishkin* was that where the materials were directed at such a bizarre deviant group that the experience of the jury would be plainly inadequate to judge whether the materials appealed to a prurient interest, the jury *could* determine prurient interest appeal from the standpoint of the intended recipient group. Indeed, this Court has recognized that "[n]othing prevents a court from giving an instruction on prurient appeal to deviant sexual groups *as part of* an instruction pertaining to appeal to the average when the evidence, as here, would support such a charge." *Pinkus v. United States*, 436 U.S. 293, 302 (1978) (emphasis added); *see also Hamling v. United States*, 418 U.S. 87, 128-30 (1974) (where materials might appeal to the prurient interest of a group beyond the comprehension of the average person, the jury was properly instructed that in determining the existence of prurient appeal, it should measure the prurient appeal to all groups).

N. W. Enterprises apparently interprets *Mishkin* as requiring that the prurient appeal requirement be adjudged only from the standpoint of a specific group when materials are directed primarily at that group. Accordingly, N. W. Enterprises implies that to support a conviction, the prosecution had to produce evidence to guide the jury in its deliberations because jurors cannot be presumed to know the reaction of the homosexual community to "Shivaree" as they would that of the average person. This Court has explicitly reserved judgment on the evidentiary and instructional requirements in a case where "the contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to

the prurient interest." *Pinkus*, 436 U.S. at 303; *Paris Adult Theatre I*, 413 U.S. at 56 n.6. The Court need not render judgment on these issues in this case because the intended recipient group, homosexuals, is not such a bizarre deviant group that the average juror could not determine whether "Shivaree" appealed to that group's prurient interest in sex.

Homosexuals represent an ever-expanding segment of our society. It is true that in *Mishkin* some of the materials supporting an instruction on the prurient interest of deviant sexual groups depicted lesbian activity. No court, however, has ever held that homosexuals are *per se* a deviant sexual group beyond the comprehension of the average juror. In *Mishkin*, the materials involved not only lesbianism, but also flagellation and fetishism. This case involves only depiction of homosexual intercourse and sodomy. It does not involve such deviant sexual practices as bondage or bestiality, which would almost certainly disgust and sicken most normal persons. *See United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985) (such activity would not appeal to the average person's prurient interest so that the government was required to establish the existence of a deviant group to whom such material appeals, and that the material at issue would appeal to such a group).

While homosexual conduct may be reprehensible to some members of society, it is nonetheless true that, given the prevalence of homosexuality, it cannot be equated with bondage and bestiality or be said that the average person could not fathom the prurient appeal evoked by "Shivaree." Moreover, *Kaplan v. California*, 413 U.S. 115 (1973), involved materials depicting both heterosexual and homosexual conduct. The Court held that once the prosecution introduced the obscene material itself into evidence, the state need not present

any further evidence on the issue of whether the material was obscene. *Id.* at 121. The obvious implication was that the jury was capable of assessing whether both the heterosexual and homosexual activity appealed to a prurient interest in sex and that a "deviant group" instruction was not required for the homosexual material. Thus, this is not a proper case for the Court to consider the specific question reserved for judgment in *Pinkus* and *Paris Adult Theatre I.*

### B. *The evidence was sufficient to justify the finding that the material appealed to a prurient interest in sex under the court's instruction.*

Whether or not certain material appeals to a prurient interest is a question of fact. *Smith v. United States*, 431 U.S. 291, 301 (1977). Because the prurient appeal of "Shivaree" was not beyond the average juror's comprehension, the state was not required to introduce any further evidence on obscenity once "Shivaree" had been shown to the jury because the film itself was the best evidence of what it represented. *Pinkus*, 436 U.S. at 302; *Kaplan*, 413 U.S. at 121; *Paris Adult Theatre I*, 413 U.S. at 56. While N. W. Enterprises introduced evidence tending to show that "Shivaree" did not appeal to the prurient interest in sex of homosexuals, such fact is of no consequence. First, this testimony did nothing to disprove that "Shivaree" appealed to the prurient interest of the average person, and it was permissible for the jury to base a finding of obscenity on such an existing prurient appeal. Secondly, the jury was not bound to accept the opinion of any of N. W. Enterprises' experts in weighing the evidence of obscenity. *Hamling*, 418 U.S. at 101. Therefore, the evidence was sufficient to support the jury's finding that "Shivaree" was obscene.

## III.

## THE TRIAL COURT'S JURY CHARGE WAS NOT CONSTITUTIONALLY INFIRM BECAUSE IT FAILED TO INQUIRE ABOUT N. W. ENTERPRISES' SPECIFIC INTENT.

A state's decision with respect to criminal procedures is not subject to proscription under the Due Process Clause unless it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be deemed fundamental. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). Accordingly, due process prevents conviction of a criminal defendant unless the state proves, beyond a reasonable doubt, every fact necessary to constitute the crime with which he is charged. *In re Winship,* 397 U.S. 358, 364 (1970). Therefore, to conform to the requirements of due process, a jury instruction must not relieve the state of its burden of proof on all elements of the alleged offense. *Sandstrom v. Montana*, 442 U.S. 510 (1979). The jury instruction at N. W. Enterprises' obscenity trial in fact met this due process standard, and, therefore, N. W. Enterprises received all the process it was due.

Under Texas law, a person commits the offense of promoting obscenity if, knowing its contents and character, he promotes or possesses with intent to promote any obscene material. Tex. Penal Code Ann. § 43.23(c)(l) (Vernon Supp. 1988). A "person" includes a corporation. Tex. Penal Code Ann. § 1.07(27) (Vernon 1974). Moreover, the conduct of an agent performed within the scope of his employment and on behalf of a corporation is attributed as a matter of law to the corporation and establishes the criminal responsibility of a corporation for offenses made applicable to

corporations via the Penal Code. Tex. Penal Code Ann. § 7.22(a)(l) (Vernon 1974).

The Texas Legislature made clear its intent to subject corporations to criminal liability under Section 43.23 by making the section applicable to "persons" rather than "individuals." A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Tex. Penal Code Ann. § 6.03(a) (Vernon 1974). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. Tex. Penal Code Ann. § 6.03(b) (Vernon 1974). Thus, in order to convict N. W. Enterprises, the state had to prove only that an agent of N. W. Enterprises, knowing the content and character of "Shivaree," promoted the film or possessed it with intent to promote it.

N. W. Enterprises claims that the trial court's charge denied it its constitutional rights, apparently because the instruction removed the state's burden to prove beyond a reasonable doubt that N. W. Enterprises acted with the requisite intent necessary to commit an offense under Section 43.23. This argument ignores the fact that the Texas Legislature has the supreme authority to define what constitutes a criminal offense in the State of Texas. The record reflects that the trial court instructed the jury that before N. W. Enterprises could be found guilty, it first had to find that an agent of N. W. Enterprises acting within the scope of his employment and on N. W. Enterprises' behalf possessed the necessary *mens rea*

for the commission of an offense under Section 43.21 as defined in the charge. Clearly, this charge did not relieve the state of its burden of proof on N. W. Enterprises' guilt under the applicable law. The Constitution does not require that the trial court instruct the jury to determine whether N. W. Enterprises per se possessed the requisite specific intent for an offense under Section 43.23 because Texas law does not so require. Moreover, it is now well settled that criminal liability for the commission of certain offenses may be imputed to a corporate defendant. *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958); *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909). Because corporations act only through human agents, the requisite level of intent--here, a "knowing" or "intentional" act--must be imputed to the corporation. N. W. Enterprises' arguments are best addressed to the Texas Legislature.

## IV.

## THE SEARCH WARRANT PURSUANT TO WHICH "SHIVAREE" WAS SEIZED WAS BASED ON PROBABLE CAUSE TO BELIEVE THE FILM WAS OBSCENE.

The seizure of films on the basis of their content implicates first amendment concerns not raised by other kinds of seizures. *New York v. P. J. Video, Inc.*, ___ U.S. ___, 106 S.Ct. 1610, 1614 (1986). Accordingly, this Court has required that certain special conditions be met before such seizures may be carried out. *Id.* For instance, in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), this Court held that a warrant authorizing the seizure of materials presumptively protected by the first amendment may not issue solely on the conclusory allegations of a police officer that the

sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may "focus searchingly on the question of obscenity." Because the longstanding protections such as that in *Lee Art Theatre* are adequate to ensure that first amendment interests will not be impaired by the issuance and execution of warrants authorizing the seizure of films, this Court has held that an application for a warrant authorizing the seizure of materials presumptively protected by the first amendment should be evaluated under the same standard of probable cause used to review warrant applications generally. *New York v. P. J. Video. Inc.*, ___ U.S. at ___, 106 S.Ct. at 1615.

The general standard of review for whether there is probable cause to support the issuance of a search warrant was established by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983). According to *Gates*, the term "probable cause" means less evidence than that which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion. *Id.* at 235. The task of the issuing magistrate is simply to determine whether, under all the circumstances alleged in the affidavit, there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238. The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.*

Here, it is clear, just as in *New York v. P. J. Video. Inc.*, that the search warrant was supported by probable cause to believe that "Shivaree" was obscene under Texas law. The affidavit[4] describing the contents

[4]The affidavit pursuant to which the search warrant was issued is set forth in Appendix A, attached hereto.

of "Shivaree" adequately established the second element of obscenity under the Texas statute, namely that the film depicted "patently offensive representations" of the various sex acts described in the statute. A review of the affidavit should also satisfy this Court that the issuing magistrate was given more than enough information to conclude that there was a "fair probability" that the film satisfied the first and third elements of the statute, namely that it appealed to a prurient interest in sex and lacked serious literary, artistic, political or scientific value. *See New York v. P. J. Video, Inc.*, ___ U.S. at ___, 106 S.Ct. at 1616. Therefore, N. W. Enterprises' contention that there was not probable cause to justify the issuance of the search warrant and that "Shivaree" was unconstitutionally admitted into evidence is clearly without merit.

## CONCLUSION

For these reasons, the state respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

## APPENDIX A

THE STATE OF TEXAS )( AFFIDAVIT FOR SEARCH
COUNTY OF HARRIS )( WARRANT

I, S.R. Jett, a peace officer employed by the City of Houston Police Department, Vice Division, do solemnly swear that I have reason to believe and do believe that Dennis Michael Funck, a white male, date of birth 11-22-58, who has given the address of 3115 Norhill, who is 5'10, 175 pounds, short brown hair, thin mustache, and ruddy complexion, does intentionally, knowingly, and unlawfully possess and promote obscene material, to-wit: a motion picture entitled, "Shivaree", while knowing the content and character of said material, and further, that said material was promoted and exhibited at the stadium bookstore, located at 4629 West 34th, Houston, Harris County, Texas. Said location is under the care, custody, and control of Dennis Michael Funck, a white male, date of birth of 11-22-58, who has given the address of 3115 Norhill, who is 5'10, 175 pounds, short brown hair, thin mustaches, and ruddy complexion.

My belief is based on the following facts:

On February 9, 1982, your affiant, while performing his duties as a plainclothes vice officer for the City of Houston Police Department, did enter the above location, which is a one story brick building with a wooden front door. This business is located on the end of a small strip shopping center, with the name of the business posted on a sign in the parking lot. The front of the business has at least two large glass windows, one on each side of the door. After obtaining $5 in change from the clerk, Dennis Michael Funck, who your affiant knows personally, and paying a 75¢ cover charge to this clerk to enter the peepshow area, your

affiant was able to enter booth #12. Your affiant selected this booth from a display card on a display board at the entrance to the peepshow. After inserting 8 quarters into the machine, one at a time, your affiant was able to view an entire motion picture, entitled, "Shivaree", and did observe the following acts and representations which were in said film and were in violation of article 43.21 et seq of the Texas Penal Code. The entirety of said film to include the aforementioned obscene acts are described in detail below:

The film begins showing some horses in a corral, with several cowboys. The film then shows the name of the film as "Shivaree". Several cowboys then go into what looks like a bunk house. One male is laying face down on the bottom of a bunk bed, and this male is wearing long underwear with the buttocks flap down. A male, who shall be attempted to be described as the #1 male, reached down and began rubbing the buttocks of this male with the long underwear, who shall be known as the #2 male. A third male is standing beside the bed masturbating himself. This #2 male then begins to commit oral sodomy on the penis of this #3 male. The #1 male begins oral sodomy on the penis of the #2 male. The #3 male commits oral sodomy on the penis of the #1 male, forming a circle. The #2 male then begins to place his mouth and tongue into the anus of the #3 male.

The #1 male moves around and begins to masturbate himself, as he places his finger into the anus of the #3 male. The #1 male begins anal intercourse with this #3 male. Again the men switch, and each male is committing oral sodomy on the penis of another male. The #2 male then places the #3 male onto his chest, and begins committing oral sodomy on the penis of the #3 male. The #1 male commits oral sodomy on the penis of the #2 male again. This #1 male also begins to

place his mouth and tongue into the anus of the #2 male. The #1 male also begins to commit anal intercourse with the #2 male.

After a few moments of this situation, the #3 male begins to ejaculate semen onto the mouth of the #2 male. The #2 male is masturbating himself and also ejaculates semen onto his own stomach. The #1 male then ejaculates semen onto the #2 male.

A 4th male, who is wearing red long underwear, enters, begins masturbating and soon begins masturbating and ejaculating semen onto the face of the #1 male. The #1 male begins oral sodomy on this #4 male.

Wherefore premises considered, your affiant respectfully requests that a warrant be issued authorizing your affiant, or any other peace officer, to enter the above described premises, being the stadium bookstore, located at 4629 West 34th, Houston, Harris County, Texas, and therein to seize the above described obscene material, to-wit: a motion picture entitled, "Shivaree". Furthermore, your affiant additionally requests that this warrant authorize your affiant, or any other peace officer, to arrest Dennis Michael Funck, a white male, date of birth of 11-22-58, who has given the address of 3115 Norhill, who is 5'10, 175 pounds, short brown hair, thin mustache, and ruddy complexion, and any other person unknown to your affiant who may be found therein and who are engaging in the promotion and exhibition of said film.

[signature]

Sworn to and subscribed before me by [S.R. Jett], on this [10] day of [Feb.], 1982, time: [11:38 A]

[signature]
Magistrate, Harris County, Texas